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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 453

MORRISON T. WADE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE RECORDER'S COURT OF THE CITY OF DETROIT AND BRIEF IN SUPPORT THEREOF

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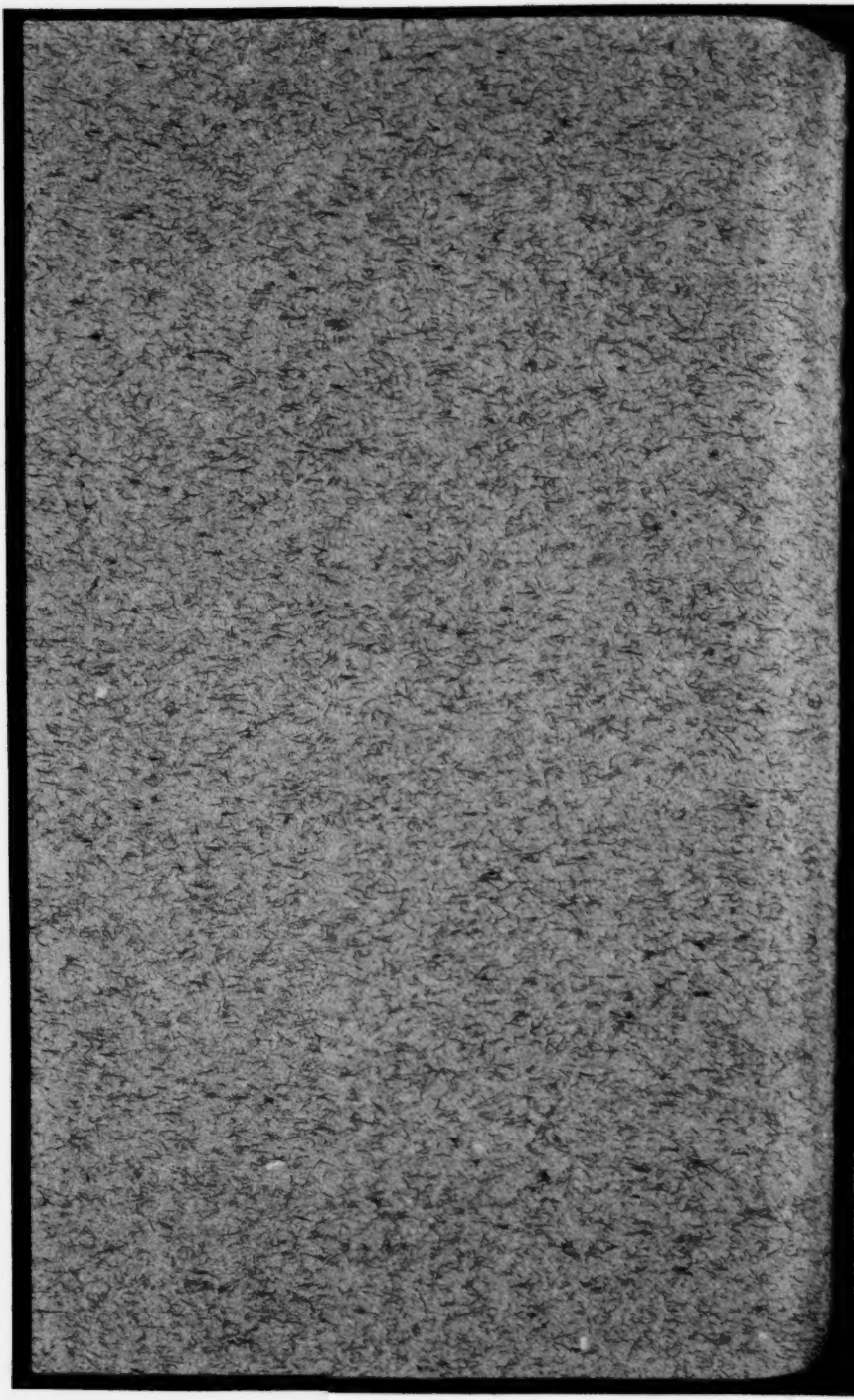

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(Numbers in parentheses are references to pages in the printed transcript of record, unless otherwise noted.)

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT: Your Petitioner, Morrison T. Wade, a citizen of the State of Michigan, hereby respectfully petitions for review upon Writ of Certiorari, of a decision and judgment of the Recorder's Court of the City of Detroit, and respectfully shows:

A

Summary Statement of Matter Involved

This case challenges the power of the judges of the State of Michigan to act as so-called one man grand juries, and their power to find persons guilty of Contempt of Court while acting as one man grand juries.

In the instant case, the Recorder's Court of the City of Detroit is the court of last resort, by reason of the fact that the Petitioner had no right to an appeal to the Supreme Court of the State of Michigan as a matter of course; that he made application for leave to appeal to the Supreme Court of the State of Michigan (1-4), which was denied by the Court on September 9th, 1948, without opinion (58).

That on or about the 3d day of February, 1948, James N. McNally, Prosecuting Attorney of Wayne County, and Eugene F. Black, Attorney General of the State of Michigan, filed a petition in the Recorder's Court for the City of Detroit, for a "one-man grand jury" to investigate the commission of certain crimes in the City of Detroit, in pursuance of Section 17217, *et seq.*, of the Compiled Laws of the State of Michigan for 1929 (being Sec. 28.943 *et seq.* of the Michigan Statutes Annotated) (9-11); that said petition was granted and the Honorable Gerald W. Groat was appointed to conduct the so-called one-man grand jury investigation.

That while the petition for a grand jury was a blanket petition, naming no persons or organizations, it subsequently developed that the Society of Good Neighbors, a Michigan non-profit corporation, was to be the main object of the grand jury investigation; consequently, officers, members of the board of directors, employees, charity recipients and all and sundry persons having anything to do with the Society of Good Neighbors were called as witnesses by the one-man grand jury and its attaches.

Petitioner was and is the founder and managing director of the Society of Good Neighbors and is also the treasurer of Holiday House, Inc., a Michigan corporation organized in April, 1946 for the purpose of dealing in flowers, plants, horticultural products and to operate stores for the sale of flowers, gifts and antiques and to deal in personal property at retail and wholesale and to manufacture personal property; and was called as a witness before the grand jury and appeared upon several occasions.

That most of the original books of entry and records of the Society of Good Neighbors were delivered to the attaches of the "grand jury" on or about February 6, 1948, and are still in the possession of the "grand jury."

Petitioner further says that on or about May 5, 1948, a "subpoena duces tecum" was issued out of the Recorder's Court for the City of Detroit, directing Morrison T. Wade to appear before the Hon. Gerald W. Groat, sitting as a "one-man investigation", Exhibit 2 (12). The subpoena directed Wade to bring before Judge Groat records of other corporations, Holiday House, Inc., Recreation, Inc., Thompson-Wade Corporation, and Chase-Wade Boat Company, of which corporations he was an officer.

Petitioner further says that he appeared before Judge Gerald W. Groat, sitting as a one man grand jury in the Recorder's Court of the City of Detroit, on the 6th day of May, 1948 at 9:30 A. M., but did not bring any records with him; that some of the records named in the subpoena had previously been delivered, but the following named in the subpoena had not been brought before Judge Groat: Accounts receivable and payable sheets, sales invoices, purchase invoices, book of returns, sales tax stubs, income tax return copy, sales journal and petty cash vouchers.

That on or about May 7, 1948, Edwin W. Scott, an Assistant Prosecuting Attorney for the County of Wayne,

filed a petition in the Recorder's Court for the City of Detroit, *in re* Morrison T. Wade, Miscellaneous No. 44945, praying that an Order to Show Cause issue requiring the said Morrison T. Wade to appear and answer as to why he should not be held in contempt of court and punished therefor. An Order to Show Cause was issued in pursuance of said petition by the Hon. Gerald W. Groat, Judge of the Recorder's Court of the City of Detroit (13-18), who was also acting as the one man grand jury and investigation.

Petitioner further shows that he filed a motion to dismiss the Order to Show Cause, Exhibit 5 (18-23), which motion came on to be heard before Judge Groat, also acting as the one man grand jury, who denied the motion, and proceeded to the hearing on the Order to Show Cause for contempt. The Petition for the Order to Show Cause shows it was based upon excerpts taken from the so-called one-man grand jury proceedings and did not cover all of the testimony of the respondent when he appeared in answer to said subpoena; that a full transcript was not made available and that the excerpts taken out of the context were selected by the Prosecuting Attorney to give the indicia of contumacy; that the trial court ruled that the records of the other corporations were necessary for the further inquiry into the grand jury matter without permitting the petitioner to introduce evidence as to the materiality of the said books and records.

The court stated that the Petitioner would be permitted to bring in the records and said: "I don't know; I know what has happened in this grand jury and I have heard all the testimony and these records will have to be brought in or he will be held in contempt of court. That is all there is to it" (51).

Petitioner stated in open court that he was perfectly willing to turn over all the books and records of all the

corporations even though he feared that the attaches of the grand jury would be calling on their creditors. The trial court stated: "Now, you can strike that from the evidence, the latter part of that statement. It is not the intention of this Court to do anything but what is proper. If you mention my name as the Grand Jury, I think you would be in contempt for saying that. The attaches of the Grand Jury are working directly under me and I am held responsible for what they do. Some of it is under my direction. I don't know what they tell the public when they get out, but I have talked to a lot of these witnesses personally" (52).

Petitioner agreed to bring in the books and records, whereupon the Court said (53): "You are not through with the contempt," and "All right I will adjourn this case to 9:30 tomorrow morning, and I expect all the records in here. Then we will continue with the other part of the contempt" (53).

The Record shows that counsel for respondent requested an opportunity to put in proofs and that the trial court said (53): "Well, I don't know how you wish to put them in. We are not going to sit here and listen to a lot of witnesses that don't know what they are talking about. If you bring in the proper witnesses and the Court deems it advisable, I will let them testify. If you don't, they don't testify. Nine thirty tomorrow morning. Have all the records here. That is your statement, I understand, under oath?"

Judge Groat, Judge of the Recorder's Court of the City of Detroit, acting as a one-man grand jury, found the Petitioner guilty of contempt notwithstanding his production of the books and records, and said (56): "You have acted throughout with studied contempt of the authority of this Court and of its process. You have contumaciously proclaimed your right to dictate to the Court the conditions

upon which the Court may inspect the said books and records for the purposes of the inquiry being conducted by the Court. You have failed to obey the Court order and have announced that you will not obey.

"In addition, you forbade Oliver Fluke, the bookkeeper for these organizations, to produce these records, although, according to your testimony yesterday, some of these records could not be produced yesterday because he has the only keys to the vaults or places of safekeeping in which they were kept.

"These actions on your part were contumacious and you are in contempt of court for the following reasons:

"(1) Because by your actions you have delayed for more than a month the proceedings before this Grand Jury;

"(2) Because you have attempted to dictate to this Court the manner in which it should conduct its inquiry;

"(3) Because you refused to obey the order of this Court.

"In your testimony yesterday you offered to produce the records desired and today you have produced them. By these actions you have purged yourself partially but not wholly of this contempt. This Court cannot permit witnesses to dictate when and under what circumstances they shall obey its processes.

"I find you guilty of contempt of court, and sentence you to pay a fine of $100, or serve thirty days in the Wayne County jail."

Petitioner further shows that the excessive zeal of the so-called "one-man grand jury" is further demonstrated by the fact that contempt proceedings were instituted by the Hon. Gerald W. Groat against one Paul Westerkamp, a witness called to testify in the investigation against the Society of Good Neighbors, for his refusal to disclose privileged communications between himself and his counsel;

that the Detroit Bar Association petitioned for the right to intervene in said proceeding on behalf of said witness, which was granted; that after arguments of counsel and briefs filed by counsel for the witness and the Detroit Bar Association, the trial court reluctantly dismissed the contempt proceedings against said Paul Westerkamp.

B

Statement as to Jurisdiction

It is respectfully urged that the conviction of petitioner of contempt of court without his being permitted to have witnesses in his behalf amounts to no proper hearing and his conviction of contempt of court after having produced the books and records required was a denial of petitioner's rights under Section 1 of the 14th Amendment to the Constitution of the United States, which provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*"

Section 237(b) of the Judicial Code as amended (Sec. 344(b), Title 28, Judicial Code and Judiciary, U. S. Code Ann.), provides:

> "It shall be competent for the Supreme Court by certiorari to require that there be certified to it for review and determination * * *, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution. * * *"

Re "highest court" of a State, see:
Jamison v. *Texas*, 318 U. S. 413, 87 L. Ed. 869;
Largent v. *Texas*, 318 U. S. 418, 87 L. Ed. 873;
Minneapolis, St. P. Etc. v. *Rock*, 279 U. S. 410, 73 L. Ed. 766.

Petitioner respectfully submits that Sections 17217 and 17218, Compiled Laws of the State of Michigan (Sec. 28.943 and 28.944 Michigan Statutes Annotated), (the so-called one man Grand Jury statutes) which provide as follows:

"Sec. 28.943 Proceedings before trial; investigation of suspected offenses by judge or justice; summoning witnesses, inquiry, compensation.) SEC. 3. Whenever by reason of the filing of any complaint, which may be upon information and belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense, such justice or judge in his discretion may, and upon the application of the prosecuting attorney, or city attorney in the case of suspected violation of ordinances, shall require such person to attend before him as a witness and answer such questions as such justice or judge may require concerning any violation of law about which he may be questioned; and the proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings. (C. L. '29, Sec. 17217.)

"Sec. 28.944 Same; apprehension of suspected person; removal of public officers, procedure; disclosure of statement.) SEC. 4. If upon such inquiry the justice or judge shall be satisfied that any offense has been committed and that there is probable cause to suspect

any person or persons to be guilty thereof, he may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the justice or judge shall proceed with the case, matter or proceeding, in like manner as upon formal complaint. And if upon such inquiry the justice or judge shall find from the evidence that there is probable cause to believe that any public officer, elective or appointive and subject to removal by law, has been guilty of misfeasance or malfeasance of office or wilful neglect of duty or of any other offense prescribed as a ground of removal, the said justice or judge shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under the law to conduct removal proceedings against said officer. And said finding shall be a sufficient complaint as a basis for removal of said officer and the public officer, public board or public body having jurisdiction of removal proceedings against said officer shall proceed in the method prescribed by law for a hearing and determination of said charges. And in respect of communicating or divulging any statement made by such witnesses during the course of such inquiry, the justice, judge, prosecuting attorney and other person or persons who may, at the discretion of such justice, be admitted to such inquiry, shall be governed by the provisions of law relative to grand jurors. (C. L. '29, Sec. 17218)."

are in violation of Section 4, Article IV of the Constitution of the United States, which provides:

"The United States shall guarantee to every State in this Union a republican form of government,"

and are in violation of the 14th Amendment to the Constitution of the United States, which provides: (Section 1)

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

C

Questions Presented

The following questions are presented:

(1) Is the so-called one-man grand jury act of Michigan (Sec. 17217 et seq. of the Compiled Laws of the State of Michigan for 1929), a violation of the 14th Amendment to the Constitution of the United States?

(2) Does the so-called one-man grand jury act deny a citizen the Republican form of government?

(3) Are the proceedings of a so-called one-man grand jury a denial of due process and the equal protection of the laws?

(4) Is it a denial of due process to convict a person of contempt of court for alleged misconduct before a judge acting as a secret one-man grand jury?

(5) Even assuming a witness has testified in open court, is it a denial of due process to convict him of contempt of court upon an incomplete record made up of exerpts taken from testimony before a "one man" grand jury, without a complete record and without permitting him to testify and have witnesses testify in his behalf?

D

Rulings of the Michigan Courts on the Questions Presented

The foregoing questions were contained in respondent's motion to dismiss the Order to Show Cause before the Honorable Gerald W. Groat, Judge of the Recorder's Court of the City of Detroit, who was also acting as the one man grand jury. (18-23) The motion was denied.

Petitioner filed application for leave to appeal to the Supreme Court of the State of Michigan, setting forth the above questions as well as others, and the Court denied the petitioner's application for leave to appeal without any opinion. (58)

E

Reasons for Allowance of the Writ

(a) Petitioner was found guilty of contempt of court based upon allegedly contumacious behavior while appearing as a witness before the Judge acting in secret proceedings as a one man grand jury.

(b) Section 17219 of the Compiled Laws of the State of Michigan for 1929 (Sec. 28.945 Michigan Statutes Annotated) which provides:

> "Sec. 5. Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such justice or judge may require material to such inquiry, shall be deemed guilty of contempt and shall be punished by a fine not exceeding one hundred (100) dollars or imprisonment in the county jail not exceeding sixty (60) days or both at the discretion of the court: Provided, That if such witness after being so sentenced shall appear and answer such question, the justice or judge may in his discretion commute or suspend the further execution of such sentence. (C. L. '29, Sec. 17219.)"

is the only Statute of the State of Michigan defining contempt of a witness before a grand jury; petitioner purged himself of the alleged contempt for failure to produce books and records by bringing in the books and records demanded by the one man grand jury, notwithstanding which he was adjudged guilty of "contempt of court."

(c) Because the Judge, sitting as a secret one man grand jury is an inquisitorial body, and at the same time assumes to exercise the functions of a trial court and subsequently sits also as the Judge hearing the order to Show Cause on an alleged contempt before the secret one man grand jury, thus acting in a dual capacity.

(d) Because appeals from a conviction of contempt as in the case at bar are not a matter of right but rest in the discretion of the Supreme Court of the State of Michigan, which court has established the practice, as in the case at bar, of permitting the secret one man grand jury to act in a dual capacity and to predicate a conviction upon a partial record made up of selected excerpts from the proceedings before the so-called one man grand jury of just so much of the witness' testimony as the grand juror sees fit to disclose, and denying to accused access to and use of full transcript.

(e) Because Sections 17217 and 17218 of the Compiled Laws of the State of Michigan for 1929 (Sec. 28.943 and 28.944 Michigan Statutes Annotated) by virtue of which authority the so-called one man grand jury operates, are in violation of the Fourteenth Amendment to the Constitution of the United States and deprive petitioner of his liberty and property without due process of law and are a denial to petitioner of the equal protection of the laws.

(f) Because the so-called one-man grand jury is a denial of the Republican form of government.

(g) Because the proceedings of the so-called one man grand jury in the case at bar is a clear violation of the

principles enunciated by this Court in the case of *In Re Oliver*, 92 L. Ed. 491 (decided May 8, 1948.)

(h) Because the Michigan courts, including the Michigan Supreme Court, have consistently refused to recognize the constitutional violations by the so-called one man grand jury proceedings, and proceed upon the assumption that "the one man grand jury can do no wrong."

(i) Because the protection ordained by the Constitution of the United States thus becomes meaningless for the citizens of the State of Michigan and particularly your petitioner, unless this Court intercedes in this Michigan situation.

Prayer

WHEREFORE your petitioner prays that a Writ of Certiorari issue out of and under the seal of this Court directed to the Recorder's Court of the City of Detroit, commanding such court to certify and send to this Court a full and complete transcript of the record and proceedings of said cause to the end that said cause be reviewed and determined by this Court; that the judgment of the said Recorder's Court of the City of Detroit be reversed and petitioner be discharged, and that Sections 17217 and 17218 of the Compiled Laws of the State of Michigan for 1929, creating the one man grand jury be found a denial to the citizens of the State of Michigan of a Republican form of government and repugnant to the 14th Amendment to the Constitution of the United States.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE STATE OF MICHIGAN

1

Is the so-called one-man grand jury act of Michigan (Sec. 17217 et seq. of the Compiled Laws of the State of Michigan for 1929), a Violation of the 14th Amendment to the Constitution of the United States?

The so-called one-man grand jury law, being sections 28.943 and 28.944 of the Michigan Statutes Annotated, is unconstitutional in that it violates the 14th Amendment to the United States Constitution, which states, among other matters:

> "No person shall be deprived of his life, liberty or property without due process of law, and no person shall be denied the equal protection of the laws."

In the first instance, the proceeding of the so-called one-man grand jury is not a court proceeding. It is a grand jury under the statute, and the judge acting as the grand jury does not function as a judge, but as a grand juror. This is clearly indicated by the recent decision of this Court in the case of *In Re Oliver,* (No. 215, October Term, 1947) wherein Mr. Justice Black said:

> "Grand juries investigate, and the usual end of their investigation is either a report, a 'no-bill' or an indictment. They do not try and they do not convict. They render no judgment. When their work is finished by the return of an indictment, it cannot be used as evidence against the person indicted. Nor may he be fined or sentenced to jail until he has been tried and convicted after having been afforded the procedural safeguards required by due process of law. Even when witnesses before grand juries refuse to answer proper questions, the grand juries do not adjudge

> the witnesses guilty of contempt of court in secret or in public or at all. Witnesses who refuse to testify before grand juries are tried on contempt charges before judges sitting in open court. And though the powers of a judge, even when acting as a one-man grand jury may be, as Michigan holds, judicial in their nature, the due process clause may apply with one effect on the judge's grand jury investigation, but with quite a different effect when the judge-grand jury suddenly makes a witness before it a defendant in a contempt case."

A general statement of the law in reference to what constitutes denial of the equal protection of the laws and due process which petitioner contends is applicable in the case at bar, is contained in the decision of Mr. Justice Douglas in the case of *Screws* v. *United States*, 325 U. S. 91, 89 L. Ed. 1495, on page 1499.

2

Does the so-called one-man grand jury act deny a citizen the republican form of government?

The so-called one-man grand jury is in violation of Section 4 of Article IV of the Constitution of the United States guaranteeing a republican form of government to all the States and the citizens thereof.

Article IV, Section 4, of the Constitution of the United States, reads as follows:

> "The United States shall guarantee to every state in this Union a republican form of government" • • •

This provision has been interpreted by the Federal Courts adversely to the effort to combine duties of the various departments of Government:

> *United States* v. *Ferreira*, 13 How. 40, 44, 14 L. Ed. 42;
> *Gordon* v. *United States*, 117 U. S. 697;

Matter of Sanborn, 148 U. S. 222, 13 S. Ct. 577, 37 L. Ed. 429;

Interstate Commerce Commission v. *Brimson*, 154 U. S. 447, 481, 14 S. Ct. 1125, 38 L. Ed. 49;

Muskrat v. *United States*, 219 U. S. 346, 353, 31 S. Ct. 250, 55 L. Ed. 245;

Tutun v. *United States*, 270 U. S. 568, 576, 46 S. Ct. 425, 70 L. Ed. 738;

Liberty Warehouse Co. v. *Grannis*, 273 U. S. 70, 74, 47 S. Ct. 282, 71 L. Ed. 541.

In the case of *In Re Richardson*, 247 New York 401 166 N. E. 655, Justice Cardozo, speaking for the Appellate Court, said:

> "The function of the judge is to determine controversies between litigants * * *. They are not adjuncts or advisers, much less investigating instruments of other agencies of government." * * *

Justice Cardozo speaking for the Court, says:

> "The statute was thus an encroachment upon the independence of judicial power even in the form in which it stood until recently amended. Still more clearly is it such an encroachment in its form as now reframed. The judge is made a prosecutor. He is to have his counsel and assistant counsel and experts and detectives. He is to follow trails of suspicion, to uncover hidden wrongs, to build up a case as a prosecutor builds one. If he were the district attorney of the county, he would do no more and no less. What he learns is not committed to a record available to all the world. It is locked within his breast to be withheld or disclosed as his discretion shall determine. No doubt he is to act impartially, neither presenting from malice nor concealing from favor. One might say the same of any prosecutor. The outstanding fact remains that his conclusion is to be announced upon a

case developed by himself. Centuries of common law tradition warn us with echoing impressiveness that this is not a judge's work. We should be sorry to weaken that tradition by any judgment of this court. * * *"

The Appellate Court held unconstitutional the statute under which the trial court sought to act as an inquisitor.

The Michigan Supreme Court has recognized the separation of duties of the various departments. It has particularly recognized the fact that the judicial function is separate and distinct from administrative and other departments, in the very recent case of *Local 170, Transport Workers Union of America* v. *Paul V. Gadola, Circuit Judge,* decided September 8th, 1948, 322 Mich. 332. In this case the question involved the interpretation of the Bonine-Tripp Act, No. 318 of the Public Acts of the State of Michigan for 1947, which provided for compulsory arbitration in the event of a labor-management dispute arising in certain cases. The chairman of the Board under the law was to be a circuit judge.

The Supreme Court of the State of Michigan held the law unconstitutional and Mr. Chief Justice Bushnell in his opinion said:

"We now consider the constitutional question raised in connection with the claimed violation of the fundamental principles of division of the powers of State government as preserved by Art. 4, Sec. 2 and Art. 7, Sec. 9 of the Constitution of 1908:

" 'No person belonging to one department shall exercise the powers properly belonging to another, except in the cases expressly provided in this constitution.' * * *

"Defendants' answer to plaintiffs' attack is as follows:

" '(1st) a circuit judge who becomes chairman of an arbitration board established by Sec. 13, as amended,

for the purpose of settling a single labor dispute, involving the public interests and welfare, acts in his individual rather than in his judicial capacity; he does not as a person belonging to one department exercise powers properly belonging to another; • • •'

"If the act were so drafted that any person might be appointed as chairman of the board by executive authority, and a circuit judge were thus appointed, he might possibly be said to be acting in his individual rather than in his judicial capacity; *but here he only acts because he is a circuit judge*, and then only on the call of the presiding circuit judge and without additional compensation to his judicial salary.

"Defendants' argument thus ignores the plain constitutional language that 'no person belonging to one department shall exercise the powers properly belonging to another.'

"The act here under consideration adds a new duty not judicial in nature to the office of circuit judge. Although in In Re Slattery, 310 Mich. 458, 463, we did not feel bound by In the Matter of Richardson, 247 N. Y. 401 (160 NE 655), as applied to a circuit judge acting as a one-man grand juror because he was acting in a judicial capacity, we cannot escape the reasoning of Mr. Justice Cardozo when applied to the requirements of the act in question. • • •

"Important as industrial peace may be, particularly in the field of public utilities and hospitals, the absolute independence of the judiciary from executive or legislative control is of transcendant import. Our form of government cannot be maintained without an independent judiciary; and, if we as a people submit to a mingling of government power, we then accept in fact that which we most abhor—one-man autocratic control—and the constitutional safeguards of our Nation and State would then be abrogated. • • •

"The opinions of this Court indicate that the constitutional inhibition in question is to be strictly applied. See Houseman *v.* Montgomery, 58 Mich. 364;

Manistee *v.* Harley, 79 Mich. 238; People *v.* Dickerson, 164 Mich. 148; Anway *v.* Grand Rapids Ry. Co., 211 Mich. 592; and Koeper *v.* Detroit Street Railway Commission, 222 Mich. 464. See, also, In re Application of Consolidated Freight Co., 265 Mich. 340. * * *

"The following observations are applicable to the present situation:

" ' No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty than that on which the objection is founded. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.' The Federalist No. 47.'

" 'For this reason, that convention which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time.' (Quoted from Jefferson on Notes on the State of Virginia. The Federalist No. 48.'

" 'The complete independence of the Courts of Justice is peculiarly essential in a limited Constitution.' The Federalist No. 78.'

"Defendant, Circuit Judge Paul V. Gadola, may not act as an aribtrator in this instance because of the limitations imposed on him by the cited sections of the State Constitution. * * *"

The opinion was concurred in by the other Justices and Mr. Justice Boyles in concurring said:

"I concur in the conclusion of Chief Justice Bushnell on the sole ground that the designation of a circuit judge to act as a member of the arbitration board with its power to make a binding determination of the issues involved in the labor dispute makes the act unconstitu-

tional and void. The attempt to confer such administrative powers upon a circuit judge is inseparably involved in the entire act, inasmuch as the act is meaningless without the appointment of the arbitration board. It is an attempt to confer upon a judicial officer nonjudicial powers and duties, in violation of the State Constitution (Art. 4, Sec. 2; Art. 7, Sec. 9). For the reasons stated herein, I concur in issuing the writ of prohibition, without costs."

3

Are the proceedings of a so-called one-man grand jury a denial of due process and the equal protection of the laws?

(a) In the so-called one-man grand jury, the grand juror is attempting to function both in a judicial capacity and as a grand juror which is a non-judicial function.

In the case of *Sutherland* v. *Governor*, 29 Michigan 320, Mr. Justice Cooley, on page 323, said:

> "However desirable a power in the judiciary to interfere in such cases might seem from the standpoint of interested parties, it is manifest that harmony of action between the executive and judicial departments would be directly threatened, and that the exercise of such power could only be justified on most imperative reasons. Moreover, it is not customary in our republican government to confer upon the governor duties merely ministerial, and in the performance of which he is to be left to no discretion whatever;" • • •

and on pages 324 and 325:

> "And that there is such a broad general principle seems to us very plain. Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the constitution, are of equal dignity, and within their respective spheres of action equally independent. One

makes the laws, another applies the laws in contested cases, while the third must see that the laws are executed. This division is accepted as a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others. The executive is forbidden to exercise judicial power by the same implication which forbids the courts to take upon themselves his duties.

* * * * * * *

"The Legislature in prescribing rules for the courts, is acting within its proper province in making laws, while the courts, in declining to enforce an unconstitutional law, are in like manner acting within their proper province, because they are only applying that which is law to the controversies in which they are called upon to give judgment. It is mainly by means of these checks and balances that the officers of the several departments are kept within their jurisdiction, and if they are disregarded in any case, and power is usurped or abused, the remedy is by impeachment, and not by another department of the government attempting to correct the wrong by asserting a superior authority over that which by the constitution is its equal."

As early as 1811 Chancellor Kent remarked of the separation of governmental powers:

"No maximum has been more universally received and cherished as a vital principle of freedom." *Dash* v. *Van Kleeck*. 7 Johns, 477, 5 Am. Dec. 291, 313.

In *Kilbourn* v. *Thompson*, 103 U. S. 168, 26 L. Ed. 377, it is said:

"It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers entrusted to governments, whether state or national, are divided into the three grand de-

> partments of the executive, the legislative and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system, that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other. To these general propositions there are in the Constitution of the United States some important exceptions. One of these is, that the President is so far made a part of the legislative power, that his assent is required to the enactment of all statutes and resolutions of Congress. * * * "

The first paragraph of the above was quoted with approval by Justice White, in *McCray* v. *U. S.*, 195 U. S. 27, 49 L. Ed. 78, 24 S. Ct. 769.

In *Searle* v. *Hensen*, 118 Nebr. 835, 226 N. W. 464, 69 A. L. R. 257, the Court observes:

> "The division of governmental powers into executive, legislative and judicial in this country is a subject familiar, not only to lawyers and students, but is a part of the common knowledge of the citizen. It represents, probably, the most important principle of government declaring and guaranteeing the liberties of the people, and has been so considered, at least, since the famous declaration of Montesquieu that 'there can be no liberty * * * if the power of judging be not separated from the legislative and executive powers. * * * Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be the legislator; *Were it joined to the executive power the judge* might behave with all the violence of an oppressor.' "

In *O'Donoghue* v. *U. S.*, 516, 77 L. Ed. 1356, 53 S. Ct. 740, this Court held:

> "The Constitution, in distributing the powers of government, creates three distinct and separate departments—the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, *Springer* v. *Philippine Islands*, 277 U. S. 189, 201, 72 L. Ed. 845, 849, 48 S. Ct. 480, namely, to preclude a commingling of these essentially different powers of government in the same hands. And this object is none the less apparent and controlling because there is to be found in the Constitution an occasional specific provision conferring upon a given department certain functions, which, by their nature, would otherwise fall within the general scope of the powers of another. Such exceptions serve rather to emphasize the generally inviolate character of the plan.
>
> "If it be important thus to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows as a logical corollary, equally important that each department should be kept completely independent of the others—independent not in the sense that they shall not cooperate to the common end of carrying into effect the purposes of the Constitution, but in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments. James Wilson, one of the framers of the Constitution and a justice of this court, in one of his law lectures said that the independence of each department required that its proceedings 'should be free from the remotest influence, direct or indirect, of either of the other two powers.' 1 *Andrews, Works of James Wilson* (1896), p. 367. And the importance of such independence was similarly recognized by Mr. Justice Story when he said that in reference to each other, neither of the departments 'ought to possess, directly or indirectly, an overruling

> influence in the administration of their respective powers.' 1 *Story, Const.*, 4th ed. par. 530. To the same effect, *The Federalist* (Madison), No. 48. And see *Massachusetts* v. *Mellon*, 262 U. S. 447, 448, 67 L. Ed. 1078, 1085, 43 S. Ct. 597."

Under the division of powers the enforcement of the law has been entrusted to the Executive Department. Such enforcement includes the investigation of crime, the detection of criminals and the presentation of the facts respecting crimes before the Courts. The machinery to accomplish this purpose provided by the Executive department includes police departments and constables in cities, sheriffs in counties, state police operating statewide, prosecuting attorneys in each county, and an attorney general having general supervision over the latter.

In *People* v. *Dickerson*, 164 Mich. 148, the Supreme Court had occasion to say:

> "From the foundation of our government, it has been the duty of the prosecuting attorney to prepare the case for the people. He, and he alone, must determine what witnesses shall be sworn to establish the case he presents. In case of disability or the necessity for assistance, the statute provides for substitution or assistance, as the case may be, upon proper application, but the principle of responsibility remains the same, though the service may, by reason of necessity, be temporarily performed by one clothed with statutory authority. See *Wigmore on Evidence*, 1286 and 2483. We think it clear that the preparation for and conduct of the trial on behalf of the people are acts executive and administrative in character. Under our Constitution, which jealously separates the powers of government into legislative, executive, and judicial departments, the powers and duties properly belonging to one department cannot by statutory enactment be granted to or imposed upon another department." (citing cases)

(b) A judge of the Recorder's Court has no jurisdiction under the laws of the State of Michigan to initiate criminal proceedings.

Section 17135 of the Compiled Laws of the State of Michigan for 1929 (Section 28.860 Michigan Statutes Annotated) provides:

> "For the apprehension of persons charged with offenses, excepting such offenses as are cognizable by justices of the peace, the justices of the supreme court, the several circuit judges, courts of record having jurisdiction of criminal causes and circuit court commissioners, mayors and recorders of cities and all justices of the peace, shall have power to issue processes to carry into effect the provisions of this chapter: Provided, however, That it shall not be lawful for any of the above named public officials to issue warrants in any criminal cases, except where warrants are requested by members of the department of public safety for traffic or motor vehicle violations, until an order in writing allowing the same is filed with such public officials and signed by the prosecuting attorney for the county, or unless security for costs shall have been filed with said public officials."

Section 16301 Compiled Laws of the State of Michigan for 1929 (Section 27.3562 Michigan Statutes Annotated) provides:

> "All indictments for offenses committed within the limits of the city of Detroit, which may be found and presented to the circuit court for the county of Wayne, by the grand jury of said county, shall be forthwith certified and transmitted by the clerk of said circuit court to said recorder's court, and thereupon said recorder's court shall have as full and complete jurisdiction of said indictments as if the same had been originally presented to said recorder's court, and shall have full power to take all further proceedings thereon."

Section 16302 Compiled Laws of the State of Michigan for 1929 (Section 27.3563 Michigan Statutes Annotated) provides:

> "Except as provided in the preceding section, prosecutions in the recorder's court for crimes, misdemeanors, and offenses arising under the laws of this state, and within the jurisdiction of said court, shall be by information as provided for in chapter two hundred and sixty one (261) of the compiled laws of eighteen hundred and seventy one (1871) Provided, That in all cases where an information shall be filed against any person held for trial before said court, it shall not be necessary that said information be verified by oath."

Chapter 261, Compiled Laws of 1871, provided for in Section 16302 Compiled Laws for 1929, *supra,* was repealed by Act 175 of the Public Acts of 1927, which is the Code of Criminal Procedure. The Code of Criminal Procedure says:

> "The word 'indict' includes information, presentment, complaint, warrant, and any other formal written accusations."

(Section 17118 C. L. 1929; 28.843 Michigan Statutes Annotated).

There is nothing in the statute creating and outlining the duties of the Recorder's Court of the City of Detroit which grants it any authority to initiate criminal proceedings.

Section 17217 Compiled Laws of the State of Michigan for 1929 (Sec. 28.943 Michigan Statutes Annotated) provides:

> "Whenever by reason of the filing of any complaint, which may be upon information and belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime,

offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense, such justice or judge in his discretion may, and upon the application of the prosecuting attorney, or city attorney in the case of suspected violation of ordinances, shall require such person to attend before him as a witness and answer such questions as such justice or judge may require concerning any violation of law about which he may be questioned; and the proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings."

Section 17218 Compiled Laws of the State of Michigan for 1929 (Sec. 28.944 Michigan Statutes Annotated) provides:

"If upon such inquiry the justice or judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, he may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the justice or judge shall proceed with the case, matter or proceeding in like manner as upon formal complaint. And if upon such inquiry, the justice or judge shall find from the evidence that there is probable cause to believe that any public officer, elective or appointive and subject to removal by law, has been guilty of misfeasance or malfeasance of office or wilful neglect of duty or of any other offense prescribed as a ground of removal, the said justice or judge shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under the law to conduct removal proceedings against said officer. And said finding shall be a sufficient complaint as a basis for

> removal of said officer and the public officer, public board or public body having jurisdiction of removal proceedings against said officer shall proceed in the method prescribed by law for a hearing and determination of said charges. And in respect of communicating or divulging any statement made by such witnesses during the course of such inquiry, the justice, judge, prosecuting attorney and other person or persons who may, at the discretion of such justice, be admitted to such inquiry, shall be governed by the provisions of law relative to grand jurors."

The preceding two sections are the authority under which the so-called one-man Grand Jury is being conducted by the Honorable Gerald W. Groat, Judge of the Recorder's Court of the City of Detroit.

The Michigan Supreme Court has previously held that the proceedings for the discovery of crime brought under Section 17217 *et seq.* of the Compiled Laws of the State of Michigan for 1929 do not come within the grant of exclusive jurisdiction to the Recorder's Court.

In the case of *People* v. *Ewald,* 302 Mich. 31, Mr. Justice Sharpe in his opinion gives a resume of the statutory provisions hereinabove referred to, and on page 39, said:

> "The proceedings for the discovery of crime are not 'prosecutions and proceedings * * * for crimes' within the meaning of the recorder's court jurisdiction statute. The circuit Judge conducting the investigation had the authority to cause apprehension of defendant by proper process under the general code of criminal procedure."

and on page 40:

> "Under 3 Comp. Laws 1929, § 16301 (Stat. Ann. § 27.3562), it is provided that indictments for offenses committed within the limits of the city of Detroit which may be found and presented to the circuit court by the grand jury shall be certified and transmitted to

the recorder's court. The above statute also provides that the recorder's court shall then have full and complete jurisdiction and power to take all further proceedings thereon. *It is our conclusion that the exclusiveness of jurisdiction of the recorder's court does not extend to the initiatory step in the institution of proceedings, but merely to matters subsequent thereto connected with bringing an offender to trial; and that the process was properly returnable to the recorder's court for the city of Detroit.*"

Petitioner in the case at bar, in his motion to dismiss, gave as reason XVIII the fact that the Honorable Gerald W. Groat sitting as a one-man grand jury did not take the oath as a grand juror prior to commencing the work as a one-man grand jury. This has not been denied.

Section 17218 Compiled Laws of the State of Michigan for 1929 (Sec. 28.944 Michigan Statutes Annotated) provides, among other things:

> "And in respect of communicating or divulging any statement made by such witnesses during the course of such inquiry, the justice, judge, prosecuting attorney and other person or persons who may, at the discretion of such justice, be admitted to such inquiry, shall be governed by the provisions of law relative to grand jurors."

This provision of the statute is mandatory. It requires that all of the persons including the judge be governed by the provisions of the law relative to grand jurors.

Section 17223 Compiled Laws of the State of Michigan for 1929 (Sec. 28.949 Michigan Statutes Annotated) which is the statute relative to the oath of grand jurors, provides the oath as follows:

> "You as grand jurors of this inquest, for the body of this county of . . . do solemnly swear that you will diligently inquiry and true presentment make of all

> such matters and things as shall be given you in charge; your own counsel and the counsel of the people, and of your fellows, you shall keep secret; you shall present no person for envy, hatred or malice, neither shall you leave any person unpresented for love, fear, favor or affection or hope of reward; but you shall present things truly, as they come to your knowledge, according to the best of your understanding; so help you God."

This is the only oath provided for by the statute which calls for secrecy. There is no other statute pertaining to the grand jury having such a provision; therefore, the provision in Section 17218 C. L. 1929, being Sec. 28.944, Michigan Statutes Annotated, can have reference only to the foregoing oath of secrecy.

In the case of *In re Oliver, supra*, this Court said:

> "Oaths of secrecy are ordinarily taken both by the members of such grand juries and by witnesses before them. Many reasons have been advanced to support grand jury secrecy." (citing cases)

Certainly the Legislature must have intended this sentence in the statute to have some meaning. Certainly it would not have added the justice and judge in the enumeration of persons to be governed by the provisions of the law relative to grand jurors unless it had so intended. Certainly the Legislature must have been mindful of the fact that all public officials take their constitutional oaths of office, but there are other oaths that are required when officials act in capacities requiring special oaths, such as a grand jury.

4

Is it a denial of due process to convict a person of contempt of court for alleged misconduct before a judge acting as a secret one-man grand jury?

Assuming, for the sake of argument, that the proceedings of the Honorable Gerald W. Groat sitting as a one-

man grand jury or as a "one-man investigation" are proper and constitutional, Petitioner contends it still was necessary for the said grand juror-investigator to make some showing that the books and records sought to be produced were material to the inquiry.

Section 17219 of the Compiled Laws of the State of Michigan for 1929 (Sec. 28.945 Michigan Statutes Annotated) provides:

> "Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such justice or judge may require material to such inquiry, shall be deemed guilty of a contempt and shall be punished by a fine not exceeding one hundred (100) dollars or imprisonment in the county jail not exceeding sixty (60) days or both at the discretion of the court: Provided, That if such witness after being so sentenced shall appear and answer such question, the justice or judge may in his discretion commute or suspend the further execution of such sentence."

Petitioner contends that there is nothing in the petition for the Order to Show Cause other than to the effect that "said books and records referred to in said subpoena contained material and necessary evidence to aid the Honorable Gerald W. Groat, sitting as a One-Man Grand Jury, in making an investigation and in determining whether or not any of the crimes or violations alleged in the petition for the said One-Man Grand Jury have been committed." This is but a conclusion of fact and has no supporting evidence of any kind either in the petition itself or the testimony at the hearing. The screened excerpts of the questions and answers before the Honorable Gerald W. Groat sitting as a one-man grand jury-investigator, upon which the petition for the order to show cause was based, is likewise silent as to the materiality of such records. It is the claim of the petitioner that this procedure on the part of

the prosecuting attorney and the grand jury-investigator comes squarely within the ruling in the case of *In re William Oliver*, decided by this Court in the October, 1947 term; 92 L. Ed. 490.

The conviction of the petitioner in the case at bar is based upon petitioner's alleged contumacious conduct. The court cites his reasons for finding the petitioner guilty, as follows:

> "Because by your actions you have delayed for more than a month the proceedings before this grand jury;
> "Because you have attempted to dictate to this Court the manner in which it should conduct its inquiry;
> "Because you refused to obey the order of this Court."

The petition upon which the Order to Show Cause was issued, in paragraphs 6, 7 and 8, gives as the reasons for citing the petitioner for contempt, the refusal to produce the books and records as commanded by the subpoena and the conduct of the said Morrison T. Wade in refusing and neglecting to produce the records, and his attitude and conduct in answering questions. The excerpts of the questions and answers upon which the Order to Show Cause was issued show that much was testified to which was left out in the petition for Order to Show Cause. In other words, it is the claim of the Petitioner that in the case at bar, the conviction of the Petitioner was based upon secret proceedings upon which there has been no open hearing in Court and in consequence thereof the Petitioner was deprived of his liberty without due process of law.

In the *Oliver* case, *supra*, Mr. Justice Black, on pages 495 and 496, said:

> "Many reasons have been advanced to support grand jury secrecy. See, e.g., Hale v. Henkel, 201 U. S. 43, 58-66, 50 L. Ed. 652, 659-662, 26 S. Ct. 370; State v.

Branch, 68 N. C. 186, 12 Am. Rep. 633. But those reasons have never been thought to justify secrecy in the trial of an accused charged with violation of law for which he may be fined or sent to jail. Grand juries investigate, and the usual end of their investigation is either a report, a 'no-bill' or an indictment. They do not try and they do not convict. They render no judgment. When their work is finished by the return of an indictment, it cannot be used as evidence against the person indicted. Nor may he be fined or sentenced to jail until he has been tried and convicted after having been afforded the procedural safeguards required by due process of law. Even when witnesses before grand juries refuse to answer proper questions, the grand juries do not adjudge the witnesses guilty of contempt of court in secret or in public or at all. Witnesses who refuse to testify before grand juries are tried on contempt charges before judges sitting in open court. And though the powers of a judge even when acting as a one-man grand jury may be, as Michigan holds, judicial in their nature, the due process clause may apply with one effect on the judge's grand jury investigation, but with quite a different effect when the judge-grand jury suddenly makes a witness before it a defendant in a contempt case.

"Here we are concerned, not with petitioner's rights as a witness in a secret grand jury session, but with his rights as a defendant in a contempt proceeding. The powers of the judge-grand jury who tried and convicted him in secret and sentenced him to jail on a charge of false and evasive swearing must likewise be measured, not by the limitations applicable to grand jury proceedings, but by the constitutional standards applicable to court proceedings in which an accused may be sentenced to fine or imprisonment, or both."

In the case at bar, the statement of the court clearly indicates that he did not know whether the books and records were material. We quote from the Record, page 50, as follows:

"Mr. Davidow: If your Honor please, give us the assurance that your attaches will not call upon anybody whose name appears in the book receivable or payable.

"The Court: I can't do that, because I don't know what we are going to find when we find them. That is what we have been trying to do during this whole inquiry."

The petitioner purged himself of contempt by delivering the disputed records demanded by the grand jury.

It is the claim of the petitioner that the only reason he was cited for contempt was his failure to produce certain books and records of his private enterprises. This claim is supported by the petition upon which the Order to Show Cause is based. Exhibit 3 (13-17), and the transcript of testimony (24-57). The isolated excerpts in the petition have reference only to the petitioner's refusal to deliver certain books and records. The transcript of the testimony shows that when counsel for petitioner requested an opportunity to bring in witnesses in behalf of the petitioner, the court ordered counsel to proceed with the showing (50-53).

As appears on page 51 of the transcript, the Court said:

"I don't know, I know what has happened in this Grand Jury, and I have heard all the testimony and these records will have to be brought in or he will be held in contempt of court. That is all there is to it."

Thereupon the petitioner stated to the court that he was willing to turn over all the books and records and after that had been arranged for, the Court stated:

"You are not through with the contempt"——

and on page 53:

"Then we will continue on with the other part of the contempt." (53)

and we quote from page 53:

> "Mr. Davidow: Is Your Honor going to pass upon our—will Your Honor give us an opportunity of putting in our proofs as we wish to?
>
> "The Court: Well, I don't know how you wish to put them in. We are not going to sit here and listen to a lot of witnesses that don't know what they are talking about. If you bring in the proper witnesses and the Court deems it advisable, I will let them testify. If you don't they don't testify."

In the case of *In re Oliver, supra,* Mr. Justice Black reviews the provisions of the Michigan so-called one-man grand jury law in reference to the duty of witnesses to testify, and on pages 494 and 495, said:

> "Whenever this judge-grand jury may summon a witness to appear, it is his duty to go and to answer all material questions that do not incriminate him. Should he fail to appear, fail to answer material questions, or should the judge-grand jury believe his evidence false and evasive, or deliberately contradictory, he may be found guilty of contempt. This offense may be punishable by a fine of not more than one hundred dollars, or imprisonment in the county jail not exceeding sixty days, or both, at the discretion of the judge-grand jury. If after having been so sentenced he appears and satisfactorily answers the questions propounded by the judge-jury, his sentence may, within the judge-jury's discretion, be commuted or suspended. At the end of his first sentence he can be resummoned and subjected to the same inquiries. Should the judge-jury again believe his answers false and evasive, or contradictory, he can be sentenced to serve sixty days more unless he reappears before the judge-jury during the second 60-day period and satisfactorily answers the questions, and the judge-jury within its discretion then decides to commute or suspend his sentence."

Section 17219 Compiled Laws of the State of Michigan for 1929 (Section 28.946 Michigan Statutes Annotated) provides:

> "Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such justice or judge may require material to such inquiry, shall be deemed guilty of a contempt and shall be punished by a fine not exceeding one hundred (100) dollars or imprisonment in the county jail not exceeding sixty (60) days or both at the discretion of the court; Provided, That if such witness after being so sentenced shall appear and answer such question, the justice or judge may in his discretion commute or suspend the further execution of such sentence."

It seems abundantly clear that the intent and purpose of this section, as stated by the United States Supreme Court in the *Oliver* case, is that a witness may purge himself of the contempt by appearing and answering the questions. In the case at bar, however, petitioner did deliver the books and records requested, but the trial court found him guilty of contempt of court nevertheless, and disregarded the fair inference of the statute.

> Petitioner contends that the Honorable Gerald W. Groat, sitting as a one-man grand jury, was not sitting as a court.

The petition upon which the Order to Show Cause for contempt was based is entitled in the proceeding upon which the calling of the grand jury was founded. The petition itself sets forth that the proceedings involved are those of the Honorable Gerald W. Groat acting as a one-man grand jury. The provision of Section 17219 Compiled Laws of the State of Michigan for 1929 (Sec. 28.945 Michigan Statutes Annotated) is the only provision covering contempts on the part of witnesses appearing before a grand jury.

If the Honorable Gerald W. Groat was acting as a one-man grand jury, then he was limited by the statute governing grand juries and could cite for contempt only under that statute and for the reason therein set forth, which is (Sec. 28.945 Mich. Statutes Annotated *supra*):

> "Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such justice or judge may require material to such inquiry . . . ."

The petitioner in the case at bar did not refuse to appear in spite of the fact that the service of the so-called subpoena was not properly served and was not even a subpoena of any court or grand jury. He did not refuse to answer any questions.

The general statute governing proceedings for contempts is covered by Section 13910 Compiled Laws of the State of Michigan for 1929 (Sec. 27.511 Michigan Statutes Annotated, *et seq.*). The very first sentence reads:

> "Every court of record shall have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct, in the following cases, and no others:" • • •
>
> "1. Disorderly, contemptuous, or insolent behavior committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority."

If the Honorable Gerald W. Groat was acting as a grand juror, then certainly he was not sitting as a court. This would seem to be elementary, particularly in view of Section 13886 Compiled Laws of the State of Michigan for 1929 (Section 27.464 Michigan Statutes Annotated) which provides:

> "The sittings of every court within this state shall be public, and every citizen may freely attend the same."

There is no question but that the Honorable Gerald W. Groat was not sitting as a court at the time of the alleged contumacious conduct. The statute expressly provides under what circumstances courts may adjudge persons guilty of contempt. The only statute which has reference to contumacious behavior or conduct is paragraph 1 of Section 13910 Compiled Laws of the State of Michigan for 1929, *supra,* and that covers conduct during the court's sitting. There is nothing in the statute which covers the conduct of any witness appearing before a grand jury except Section 28.945 Michigan Statutes Annotated, and the latter statute gives as the only reasons "neglecting or refusing to appear in response to summons or to answer any questions which may be material to such inquiry." In the case at bar there is no showing of any kind in the petition for the Order to Show Cause upon which petitioner should have been guilty under the statute.

In the case of *In re Briggs,* 178 Mich. 28, contempt proceedings were had against respondent for disobedience of an injunction. The Court, on pages 36 and 37, said:

> "This was a special statutory proceeding. It is well settled in this State that the circuit courts, in chancery, though in ordinary cases of equity cognizance courts of general jurisdiction, must, as to such special proceedings, be considered as courts of special and limited jurisdiction, and no presumption of jurisdiction should be indulged, as in suits at common law, or ordinary suits in equity, in courts of general jurisdiction. All the necessary facts to confer jurisdiction must therefore affirmatively appear upon the record.
>
> "The doctrine is well stated in Brown on Jurisdiction, at page 17, in the following language: 'If a court or tribunal pronounces a judgment it has no authority to grant, or one outside of the issues made and before the court for determination, then such

judgment in excess of the power conferred is void as to such excess of its powers.'

• • • • • • •

"The order being void, disobedience thereof is not punishable."

In the case of *In re Mead*, 220 Mich. 480, police officer Jesse Mead was adjudged guilty of contempt of the Recorder's Court of the City of Detroit for refusing to obey an order signed by Edward J. Jeffries, Judge of the Recorder's Court. Mead gave as reason for refusing that the order was void. The Michigan Supreme court upheld him and stated that the matter was not in the Recorder's Court, that there was neither complaint, warrant or arrest thereon, and that the judge was without jurisdiction to take the bond and to make the order, and on page 483, said:

"The order being a mere nullity, the police officer was under no duty to obey it." • • •

"One may not be held in contempt for disobedience of an order or command which the court had no jurisdiction to make."

In the case at bar, the so-called subpoena, while entitled in the Recorder's Court, commands the petitioner Morrison T. Wade to appear before the Recorder's Court of the City of Detroit "there to give evidence before the Honorable Gerald W. Groat, sitting as a one-man investigation of certain crimes in the city of Detroit." The subpoena does not even recite that the witness is to appear before the Honorable Gerald W. Groat sitting as a one-man grand jury. The proceeding had become a criminal investigation, although the petition upon which the Order to Show Cause was based refers to the proceedings as a one-man grand jury. In either event the judge was not sitting as a court. He was conducting either a one-man grand jury or a criminal investigation.

Petitioner contends that the Honorable Gerald W. Groat sitting as a grand jury had pre-judged the respondent.

The exhibits in the Transcript of Record (9-24) clearly show that the proceedings upon which Morrison T. Wade was found guilty are comparable to the proceedings in the *Oliver* case, *supra.*

In the case at bar the appearance of Morrison T. Wade before the Honorable Gerald W. Groat occurred after the decision in the *Oliver* case, *supra.* The prosecuting attorney thereupon went through the formality of filing a petition upon which an order to show cause was based, to have the petitioner cited and punished for contempt of court, disregarding the plain, unambiguous condemnation of such procedure by the Supreme Court of the United States contained in the *Oliver* case. The record clearly shows that while the petitioner was cited for contempt for failure to produce the books and records and having purged himself of that contempt by bringing in the books and records, nevertheless was found guilty of contempt of court for alleged contumacious behavior although there was no record or showing of any kind of any contumacious behavior. The Honorable Gerald W. Groat sitting as a judge of the Recorder's Court on the contempt charge referred to the fact that he had heard all of the testimony as a grand juror and then went on to say (56):

"You have acted throughout with studied contempt of the authority of this Court and of its process. You have contumaciously proclaimed your right to dictate to the Court the conditions upon which the Court may inspect the said books and records for the purposes of the inquiry being conducted by the Court. You have failed to obey the Court order and have announced that you will not obey.

"In addition, you forbade Oliver Fluke, the bookkeeper for these organizations, to produce these records, although, according to your testimony yesterday, some of these records could not be produced yesterday because he has the only keys to the vaults or places of safekeeping in which they were kept.

"These actions on your part were contumacious and you are in contempt of Court for the following reasons:

"(1) Because by your actions you have delayed for more than a month the proceedings before this Grand Jury;

"(2) Because you have attempted to dictate to this Court the manner in which it should conduct its inquiry;

"(3) Because you refused to obey the order of this Court.

"In your testimony yesterday you offered to produce the records desired and today you have produced them. By these actions you have purged yourself partially but not wholly of this contempt. This Court cannot permit witnesses to dictate when and under what circumstances they shall obey its processes."

In other words, the petitioner was apparently found guilty of something that may have occurred during the secret hearing of the grand jury. Whatever it was, was certainly not made public in the petition upon which the Order to Show Cause was based. Petitioner was given no opportunity to defend himself because there is nothing in the petition which could apprise him wherein his conduct was contumacious, assuming that the grand jury had the right to punish him for contempt on the basis of conduct or behavior. The proceedings were based on selected excerpts taken from the petitioner's testimony before the so-called one-man grand jury.

In the *Oliver* case, *supra,* Mr. Justice Black, on pages 500 and 501, L. Ed., said:

> "It is true that courts have long exercised a power summarily to punish certain conduct committed in open court without notice, testimony or hearing. Ex parte Terry, 129 U. S. 289, 32 L. ed. 405, 9 S. Ct. 77, was such a case. There Terry committed assault on the marshal who was at the moment removing a heckler from the courtroom. The 'violence and misconduct' of both the heckler and the marshal's assailant occurred within the 'personal view' of the judge, 'under his own eye,' and actually interrupted the trial of a cause then under way. This Court held that under such circumstances a judge has power to punish an offender at once, without notice and without hearing, although his conduct may also be punishable as a criminal offense. This Court reached its conclusion because it believed that a court's business could not be conducted unless it could suppress disturbances within the courtroom by immediate punishment. However, this Court recognized that such departure from the accepted standards of due process was capable of grave abuses, and for that reason gave no encouragement to its expansion beyond the suppression and punishment of the court-disrupting misconduct which alone justified its exercise. Indeed in the Terry case the Court cited with approval its decision in Anderson v. Dunn, 6 Wheat (U.S.) 204, 5 L. ed. 242, which had marked the limits of contempt authority in general as being 'the least possible power adequate to the end proposed.' Id. 6 Wheat (U.S.) at 231, 5 L. ed. 248. And see Re Michael, 326 U. S. 224, 227, 90 L. ed. 30, 32, 66 S Ct. 78.
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> "Except for a narrowly limited category of contempts, due process of law as explained in the Cooke Case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or

explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority before the public.' If some essential elements of the offense are not personally observed by the judge, so that he must depend upon statements made by others for his knowledge about these essential elements, due process requires, according to the Cooke case, that the accused be accorded notice and a fair hearing as above set out.

"The facts shown by the record put this case outside the narrow category of cases that can be punished as contempt without notice, hearing and counsel. *Since the petitioner's alleged misconduct all occurred in secret, there could be no possibility of a demoralization of the court's authority before the public.*

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Even assuming a witness has testified in open court, is it a denial of due process to convict him of contempt of court upon an incomplete record made up of excerpts taken from testimony before a "one-man" grand jury, without a complete record and without permitting him to testify and have witnesses testify in his behalf?

In the case at bar, the petitioner will be deprived of his liberty without due process of law if the conviction is permitted to stand because petitioner was limited by the court in presenting his defenses.

On page 53 of the Transcript of Record, the following transpired:

"Mr. Davidow: Is Your Honor going to pass upon our—will Your Honor give us an opportunity of putting in our proofs as we wish to?

"The Court: Well, I don't know how you wish to put them in. We are not going to sit here and listen to a lot of witnesses that don't know what they are talking about. If you bring in the proper witnesses and the Court deems it advisable, I will let them testify. If you don't they don't testify."

In the case of *In re Oliver, supra,* this Court, on page 500, said:

"We further hold that failure to afford the petitioner a reasonable opportunity to defend himself against the charge of false and evasive swearing was a denial of due process of law. A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel. Michigan, not denying the existence of these rights in criminal cases generally, apparently concedes that the summary conviction here would have been a denial of procedural due process but for the nature of the charge, namely, a contempt of court, committed, the State urges, in the Court's actual presence."

In the case at bar, the petitioner was not given an opportunity to present witnesses in his behalf. Petitioner was not advised in what respect his conduct may have been contumacious. The excerpts of the testimony before the so-called grand jury failed to disclose in what manner the conduct of the petitioner was contumacious. Petitioner respectfully submits that his conviction of contempt under the circumstances is based upon the secret proceedings of the so-called one-man grand jury investigation, and that

his conviction is actually just as much an "in camera" proceedings as the proceedings in the *Oliver* case.

Conclusion

Petitioner respectfully submits that unless Certiorari is granted and his conviction of contempt and punishment by the Honorable Gerald W. Groat is set aside, he will be deprived of his liberty and property without due process of law for the reasons set forth in his Petition.

The record shows that petitioner was not given an opportunity to know what he was being charged with other than refusal to deliver certain books and records, and he was refused the opportunity to produce witnesses in his behalf. He was not confronted with any witnesses against him, and the court proceeded to find him guilty of contempt, although such action was beyond the jurisdiction and power of the court so to do.

Mr. Justice Black in the *Oliver* case, *supra,* on page 502, said:

> "Nor is there any reason suggested why 'demoralization of the court's authority' would have resulted from giving the petitioner a reasonable opportunity to appear and offer a defense in open court to a charge of perjury or to the charge of contempt. The traditional grand juries have never punished contempts. The practice that has always been followed with recalcitrant grand-jury witnesses is to take them into open court, and that practice, consistent with due process, has not demoralized the authority of the courts. Reported cases reveal no instances in which witnesses believed by grand juries on the basis of other testimony to be perjurers, have been convicted for contempt, or for perjury, without notice of the specific charges against them, and opportunity to prepare a defense, to obtain counsel, to cross-examine the witnesses against them and to offer evidence in their own defense.

> The right to be heard in open court before one is condemned is too valuable to be whittled away under the guise of 'demoralization of the court's authority.'
>
> "It is the 'law of the land' that no man's life, liberty, or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal. See Chambers *v.* Florida, 309 U. S. 227, 236, 237, 84 L. ed. 716, 721, 722, 60 S. Ct. 472. The petitioner was convicted without that kind of trial."

Mr. Justice Rutledge, in concurring in the decision in the *Oliver* case, *supra*, said: (Page 503)

> "Michigan's one-man grand jury, as exemplified by this record, combines in a single official the historically separate powers of grand jury, committing magistrate, prosecutor, trial judge and petit jury. This aggregated authority denies to the accused not only the right to a public trial, but also those other basic protections secured by the Sixth Amendment, namely, the right 'to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.' It takes away the security against being twice put in jeopardy for the same offense and denies the equal protection of the laws by leaving to the committing functionary's sole discretion the scope and contents of the record on appeal. U. S. Const. Amend. Five and Fourteen."

Petitioner respectfully submits that the Statutes complained of (Sections 17217 and 17218 of the Compiled Laws of the State of Michigan for 1929, the so-called one-man grand jury law) are a violation of the Fourteenth Amendment to the Constitution of the United States. Your petitioner respectfully submits that the record of the proceedings abundantly shows that the action of the Court sitting as a one-man grand jury, denies the petitioner and other

citizens of the State of Michigan, a Republican form of government, in violation of Section 4 of Article IV, of the Constitution, and deprives him of his liberty and property without due process of law and the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States. The record shows that the decisions of the trial court and the Supreme Court of the State of Michigan are not in accord with the applicable decisions of this Court, particularly in the case of *In re Oliver, supra.*

Respectfully submitted,

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